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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

DIANE HOLBROOK et al., Plaintiffs and Appellants, v. LOUIS CIAPPONI et al., Defendants and Respondents.	A138273 (San Mateo County Super. Ct. No. CIV-514158)

After being evicted from their apartment, Diane Holbrook and her two children sued their landlords over the landlords' alleged refusal to make repairs necessitated by a mold infestation. The landlords' anti-SLAPP[1] motion in plaintiff's action was granted with respect to one cause of action for retaliatory eviction. Defendants claim, and the trial court found, that plaintiffs' cause of action arose from defendants' filing of an unlawful detainer action, which was protected petitioning activity under Code of Civil Procedure section 425.16 (section 425.16). The court also awarded defendants more than $30,000 in attorney fees. (Subd. (c).)[2] Plaintiffs contend the anti-SLAPP motion was granted in error because (1) it was untimely, and (2) the ruling was based on the title of

[1] The acronym SLAPP stands for Strategic Lawsuit Against Public Participation. (*Copenbarger v. Morris Cerullo World Evangelism* (2013) 215 Cal.App.4th 1237, 1240, fn. 1 (*Copenbarger*).)

[2] References to subdivisions without statutory designation are to the subdivisions of section 425.16.

the cause of action rather than its gravamen. We agree with plaintiffs on the second point and reverse.

I. BACKGROUND

On December 10, 2010, Holbrook signed a one-year lease on an apartment in the Broadway Burlingame Apartments. The apartments are owned by four family trusts, the trustees of which have been named as defendants in this action. Louis Ciapponi, trustee of one of the trusts, is the owner who had the most personal contact with Holbrook.

Shortly after Holbrook and her two children moved into the apartment in December 2010, they all became ill. About six weeks after moving in, Holbrook wrote a letter to building management complaining about mold in the apartment, as well as some other needed repairs.

Ciapponi and the other owners of the building (collectively, the owners) claim they addressed the issues by having the apartment professionally cleaned, installing special air filters, and applying mold inhibitors. In addition, they offered to allow Holbrook to cancel her lease, with a refund of all rent paid and return of her full deposit. Meanwhile, they complain, Holbrook was habitually late in paying her rent and often failed to pay the late fee required by the lease.

Ciapponi filed a declaration stating there were no further complaints from Holbrook about mold or other repairs until late October 2011, when Holbrook again wrote to apartment management complaining about mold growing on a specific section of the living room wall, as well as alleged harassment by the on-site apartment managers. From late October 2011 through January 2012, there were many communications between the parties about the mold, the alleged harassment, and other repair issues.

To address the mold problem the owners had the apartment inspected by Envirosurvey, an environmental health specialty firm, on November 4, 2011, which found an overall airborne spore count inside the apartment lower than that of the outside air sample. However, the study did find elevated Cladosporium spores in the living room, which is a type of mold frequently found near windows. The same type of spores was found on the stained section of the living room wall about which Holbrook had

complained. The Envirosurvey report noted that replacing single-pane windows with double-pane windows could reduce the mold problem.

In November 2011, Holbrook stopped paying rent altogether and never paid any more rent for the duration of her occupancy of the apartment. She asserts she was withholding rent because of the mold and repair problems.

On November 21, 2011, Holbrook was given a copy of the Envirosurvey report, which she claims was incomplete.[3] On the same date, she was also presented with a form entitled "Tenant Estoppel Certificate" and asked to sign it, which she did. However, she almost immediately wrote a note to building management stating she disagreed with some of the terms of the estoppel certificate. The paragraph to which Holbrook apparently objected provided: "All obligations of Landlord under the Lease have been fully performed and Landlord is not in default under any term of the Lease. Tenant has no defenses, off-sets or counterclaims to the payment of rent or other amounts due from Tenant to Landlord under the Lease." After receiving the notices, Holbrook filed a complaint with the San Mateo County Environmental Health Department. In response to Holbrook's complaint, the San Mateo County Health System sent a letter to Ciapponi dated December 1, 2011, advising him to check and fix, if necessary, the leaking shower and the windows.[4] The letter also listed steps that could be taken by the occupant to reduce mold problems.

On December 27, 2011, Holbrook and her children were relocated at the owners' expense to a two-bedroom suite with a full kitchen at a nearby Best Western hotel while

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[3] Based on the exhibits in the record, it does appear that part of the report—including the page discussing the Cladosporium problem in the living room—was not provided to Holbrook.

[4] Defendants filed objections to several paragraphs of Holbrook's declaration, some of which were granted by the trial court. They ask us to strike from appellant's opening brief all references to matters as to which objections were sustained, including Holbrook's statement that Ciapponi received the letter and a phone call from San Mateo County Health System. While we do not strike those portions of the opening brief inconsistent with the trial court's evidentiary rulings, neither do we rely upon any matter deemed inadmissible by the trial court.

the problems in their apartment were repaired. The owners also gave Holbrook $50 per day for an anticipated increase in the cost of meals. The relocation was scheduled to last four days, but in fact lasted 24 days, after which Holbrook and her children returned to the apartment.

Under the 60-day notice of termination, the tenancy expired on January 23, 2012. Holbrook was still in default on her rent on that date. On January 25, 2012, the owners filed an unlawful detainer action against Holbrook. Holbrook entered into a stipulated judgment, agreeing to be out of the apartment by March 31, 2012. She failed to comply with that deadline, continuing to live in the apartment until May 2, 2012, when a writ of possession was executed by the county sheriff's office. At the time Holbrook was evicted, she owed $8,400 in back rent and several hundred dollars in unpaid late fees.

On May 25, 2012, Holbrook filed this action against Ciapponi, in which she alleged seven causes of action: (1) negligence; (2) breach of the implied warranty of habitability; (3) breach of the covenant of quiet enjoyment; (4) negligent infliction of emotional distress; (5) intentional infliction of emotional distress; (6) retaliatory eviction under Civil Code section 1942.5 (section 1942.5); and (7) nuisance. On November 5, 2012, Holbrook amended her complaint to include the other owners as defendants and to include her two children as plaintiffs. She also amended paragraphs of the complaint under the first, third and sixth causes of action.

On December 19, 2012, the owners filed a special motion to strike under the anti-SLAPP statute as to the sixth cause of action for retaliatory eviction only. The court granted the motion by order filed March 4, 2013. On April 4, 2013, it awarded the owners $30,380 in attorney fees. (Subd. (c)(1).)

Holbrook filed a timely notice of appeal from the March 4 order. On April 19, 2013, she amended her notice of appeal to include the April 4 fee order. Thus, both orders are properly before us.

II. DISCUSSION

A. The anti-SLAPP statute

The heart of the anti-SLAPP statute is contained in subdivision (b)(1): "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

Subdivision (e) specifies four categories of protected acts covered by the statute. The category that concerns us in this case is subdivision (e)(2), which protects "any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law."

The courts engage in a two-step process in evaluating a special motion to strike. First, the defendant must make a prima facie showing that the plaintiff's cause of action arises from an act of the defendant in furtherance of the right of petition and/or the right of free speech in connection with a public issue. (Subd. (b)(1); *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 (*Navellier*).) In the first step, the court examines the pleadings and declarations submitted in support of and in opposition to the motion. (Subd. (b)(2); *Navellier*, *supra*, at p. 89.) Important for our purposes, the court looks to the gravamen of the complaint, not simply the form of the action, in its analysis under step one. (E.g., *Ulkarim v. Westfield LLC* (2014) 227 Cal.App.4th 1266, 1274 (*Ulkarim*); *Moriarty v. Laramar Management Corp.* (2014) 224 Cal.App.4th 125, 133 (*Moriarty*).)

When a cause of action is based on both protected and unprotected activity, it will be subject to section 425.16 unless the protected conduct is "merely incidental" to the unprotected conduct. (*Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1551; *Peregrine Funding Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 672.) An act is incidental to a cause of

action "if the act is not alleged to be the basis for liability." (*Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169, 1183 (*Wallace*).)

If the defendant carries his burden to show his activity was protected, then the plaintiff must show "there is a probability that the plaintiff will prevail on the claim." (Subd. (b)(1).) A plaintiff need establish only "minimal merit" in his or her cause of action (*Navellier, supra,* 29 Cal.4th at p. 89), or stated otherwise, need prove only a " ' "[m]inimum level of legal sufficiency and triability" ' " to carry its burden. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291.)

Appellate review is de novo. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 819–820; *Ulkarim, supra,* 227 Cal.App.4th at p. 1274.)

B. Timeliness of the motion

Holbrook's first argument on appeal is that the owners' special motion to strike was untimely. Subdivision (f) provides in pertinent part: "The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper." The owners filed their motion within 60 days after the first amended complaint was filed. They claim the filing of the amended complaint triggered a new 60-day period within which to specially move to strike.

Holbrook contends, since the amendment merely added parties without changing the substance of the allegations, a new 60-day period should not be available. Therefore, she argues, the motion was untimely under the 60-day deadline in the statute.

The filing of the amended complaint started a new 60-day period running in which the owners could file a special motion to strike. (*Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 313–315; *Lam v. Ngo* (2001) 91 Cal.App.4th 832, 835, 840–842.) They filed within that period. No exception exists for amended complaints that make only nonsubstantive changes. The motion was timely.

C. Retaliatory eviction cause of action

The owners' filing of a complaint for unlawful detainer—as well as their service on Holbrook of three-day and 60-day notices—were indisputably acts of petitioning under the First Amendment to the United States Constitution and section 425.16**,**

subdivision (e)(2). (*Copenbarger*, *supra*, 215 Cal.App.4th at p. 1245; *Wallace*, *supra*, 196 Cal.App.4th at pp. 1182–1183; *Clark v. Mazgani* (2009) 170 Cal.App.4th 1281, 1286; *Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467, 1480, 1482–1484 (*Feldman*); *Birkner v. Lam* (2007) 156 Cal.App.4th 275, 281 (*Birkner*).) Employing a de novo standard of review, however, we must determine whether Holbrook's claim of a violation of section 1942.5 "arose from" the owners' filing of or communications preparatory to filing the unlawful detainer action, or whether instead it was based on other unprotected conduct.

Section 1942.5 designates specific acts that a landlord may not undertake within 180 days after a tenant takes certain actions attempting to enforce her rights to a tenantable apartment, including that the landlord may not "recover possession of a dwelling in any action or proceeding . . . ." (§ 1942.5, subd. (a).)[5]

Holbrook's sixth cause of action for "retaliatory eviction" alleged, in addition to the history of the tenancy (without mention of the unlawful detainer action or the notices preceding it): "The Defendants retaliated against the Plaintiffs as a result of the Plaintiffs' complaints about her tenancy, the request to make repairs, and her notifications to the Department of Building and Inspection, and Plaintiffs' insistence that her rights be acknowledged. The Defendants retaliated by harassing her and refusing to make repairs so that the conditions would become so bad that she would be forced to vacate." This paragraph summarizes the gravamen of the cause of action. There is no allegation in the first amended complaint that the unlawful detainer action was undertaken with retaliatory intent. In fact, the first amended complaint does not mention the legal proceedings at all.

[5] Section 1942.5, subdivision (a)(1) provides as follows: "If the lessor retaliates against the lessee because of the exercise by the lessee of his rights under this chapter or because of his complaint to an appropriate agency as to tenantability of a dwelling, and if the lessee of a dwelling is not in default as to the payment of his rent, the lessor may not recover possession of a dwelling in any action or proceeding, cause the lessee to quit involuntarily, increase the rent, or decrease any services within 180 days . . . [a]fter the date upon which the lessee, in good faith, has given notice pursuant to Section 1942, or has made an oral complaint to the lessor regarding tenantability."

Given these pleadings, Holbrook claims her retaliatory eviction cause of action is not based on the filing of the unlawful detainer action or the service of the notices preceding that filing. Rather, the cause of action "arises from" the dispute about the mold and other repair problems, the harassment to which she was allegedly subjected, and the owners' alleged ongoing refusal to make the repairs, all of which were intended by the owners to make her abandon the apartment. She made the same argument in the trial court. Her attorney there told the judge, "[W]e're not alleging anything to do with the eviction or the unlawful detainer. . . . [¶] [W]e say the defendants retaliated [against her] by harassing her and refusing to make repairs." In fact, Holbrook's counsel told the court he was familiar with the problem of potentially facing an anti-SLAPP motion if he alleged retaliation by the filing of an unlawful detainer action, and he specifically drafted the first amended complaint to avoid doing so.

Despite these protestations, the trial court appears to have rested its decision largely on the title of the cause of action. The explanation for its ruling (in its entirety) was as follows: "Pursuant to Code of Civil Procedure § 425.16, Defendants have established that the retaliatory eviction claim arises out of protected activity. Birkner v. Lam (2007) 156 Cal.App.4th 275, 281 ('[T]he prosecution of an unlawful detainer action indisputably is protected activity within the meaning of section 425.16.') The burden shifts to Plaintiffs to demonstrate the probability of prevailing on this claim, and they failed to do so. Code Civ. Proc. § 425.16(b)."

In arguing for affirmance, the owners rely on a series of cases from this district holding that the gravamen of a tenant's complaint arose from petitioning activity by the landlord. The first, *Birkner*, *supra*, 156 Cal.App.4th 275, held the gravamen of plaintiff tenants' cause of action was the service of a 60-day notice of termination of tenancy, where the landlord planned to move his disabled mother into the building. (*Id.* at p. 279.) The tenants filed a cross-complaint claiming they were protected from eviction under the local rent control ordinance due to their disability or age and length of tenancy. (*Ibid.*) The landlord's anti-SLAPP motion was unsuccessful in the trial court, but Division Three of this court reversed, finding service of the 60-day notice was protected activity under

section 425.16 and remanding the case to the trial court to determine whether the tenants had shown a probability of prevailing. (*Birkner, supra,* at pp. 282–283, 285–287.)

In *Feldman*, a landlord filed an unlawful detainer action against a tenant's subtenants, and the subtenants cross-complained for damages for, among other things, retaliatory eviction and wrongful eviction. (*Feldman, supra,* 160 Cal.App.4th at p. 1475.) The subtenants alleged that the landlord had reneged on approving the subtenancy arrangement because it wanted to increase the rent in violation of local rent control provisions, and they further alleged that an agent of the landlord had made certain threats relating to potential eviction proceedings and predicting the subtenants would "never be able to rent another apartment in San Francisco." (*Id.* at pp. 1473–1475.) The trial court found that all causes of action except negligent misrepresentation "arose from" the unlawful detainer action, but granted the landlord's anti-SLAPP motion only as to the retaliatory eviction cause of action because it determined there was a probability the subtenants would prevail on the other causes of action. **(***Id.* at p. 1476**.)**

Division Two of this district held the entire cross-complaint (save for negligent misrepresentation) should have been dismissed under section 425.16, including claims for negligence, breach of contract, breach of the implied covenant of quiet enjoyment, and unfair business practices. (*Feldman, supra,* 160 Cal.App.4th at pp. 1475, 1483–1484.) Following *Birkner, supra,* 156 Cal.App.4th 275, the *Feldman* court found the gravamen of the cross-complaint was based on the agent's "threats, the service of the three-day notice, and the filing of the unlawful detainer action." (*Feldman, supra,* at p. 1484.) In reaching that conclusion the court referred to the specific allegations in the cross-complaint on those subjects. (*Ibid.*)

The subtenants also alleged that the attorney for the landlord had made certain statements leading them to believe their subtenancy agreement had been approved, and this formed the basis of the negligent misrepresentation cause of action. (*Feldman, supra,* 160 Cal.App.4th at pp. 1473–1474, 1484, 1493.) As to those statements, the appellate court concluded they were not based on protected activity. (*Ibid.*) Having established that most of the cross-complaint was based on protected activity, *Feldman*

concluded the subtenants had not shown a probability of prevailing on any of their causes of action except negligent misrepresentation because the litigation privilege under Civil Code section 47 would bar recovery. (*Feldman, supra*, at pp. 1485–1499.)

The third case is *Wallace*, in which a disabled tenant who kept a service dog sued her landlord and fellow tenants for various causes of action relating to their efforts to force the tenant and her roommate to move out of the building. Two causes of action—for wrongful eviction and retaliatory eviction under section 1942.5—were subject to an anti-SLAPP motion by the fellow tenants. (*Wallace, supra*, 196 Cal.App.4th at pp. 1175–1180.) The motion was denied in the trial court because "[t]he gravamen of the Plaintiffs' Complaint is not that the Defendants filed a lawsuit or sent notices or threatened even to send a notice, but that the Defendants engaged in a pattern of disability discrimination designed to drive the Plaintiffs from their home, and that therefore the allegations of what would otherwise be protected conduct are incidental to the thrust of the Plaintiffs' Complaint." (*Id.* at p. 1180.) Upon the fellow tenants' appeal, our colleagues in Division Five reversed on grounds that "[i]t makes no sense for [plaintiffs] to argue that their cause of action for defendants' attempt to evict them wrongfully is not based on defendants' alleged attempt to evict them." (*Id.* at p. 1183.)

However, more recent cases dealing with anti-SLAPP motions in landlord-tenant disputes have distinguished between causes of action that actually "arise from" protected petitioning via unlawful detainer, and those that rest instead on some perhaps related but unprotected activity by a landlord. Most significantly, our colleagues in Division Two held that a tenant's action alleging uninhabitability of his rental unit, harassment, and failure to make repairs did not "arise from" the landlords' subsequent unlawful detainer action within the meaning of the anti-SLAPP statute. (*Moriarty, supra*, 224 Cal.App.4th at pp. 134–140.)

As in our case, the tenant in *Moriarty* alleged wide-ranging failure by defendants to maintain his apartment in good repair, claiming they "fail[ed] to provide a habitable dwelling; fail[ed] to maintain and repair plumbing fixtures; allow[ed] water intrusion and fail[ed] to rectify it; fail[ed] to repair multiple sources of water intrusion and remediate

development of airborne contaminants; fail[ed] to eliminate illness-causing airborne contaminants from the premises due to the persistent water intrusion, excessive dampness, and prolonged saturation of indoor building materials; permitt[ed] dilapidated and/or stained and peeling paint on the walls and ceiling; and fail[ed] to provide operable and locking windows and doors which were watertight or weatherproofed. . . ." (*Moriarty, supra*, 224 Cal.App.4th at p. 129.)

Based on these alleged failings, the tenant asserted the property management company "endeavored to recover possession of the Subject Premises in bad faith through unlawful harassment and other means, including" by "[r]efusing to perform effective repairs . . . ; [d]emanding rent while the Subject Premises was in a condition of severe dilapidation and disrepair; [and] [s]eeking to force Plaintiff to vacate the Subject Premises by permitting the Subject Premises to fall into and/or remain in a condition that was substandard, untenantable and a threat to the health and safety of Plaintiff . . . ." (*Moriarty, supra*, 224 Cal.App.4th at pp. 129–130.)

The landlords in *Moriarty* lost their anti-SLAPP motion in the trial court and appealed the ruling. (*Moriarty, supra*, 224 Cal.App.4th at p. 133.) The trial court's order was affirmed on appeal. (*Id.* at pp. 134–142.) Division Two of this district concluded that the landlords had not made the required showing under step one of the anti-SLAPP analysis. The opinion placed particular emphasis on the fact that the unlawful detainer suit was "nowhere referenced in the complaint." (*Id.* at p. 139.) The same is true here.

Notably, *Moriarty* found the opinion in *Wallace, supra*, 196 Cal.App.4th 1169 "unpersuasive" and criticized its reasoning. (*Moriarty, supra*, 224 Cal.App.4th at p. 139.) To the extent *Moriarty* and *Wallace* are irreconcilable, we choose to follow *Moriarty*, both because it is factually close to our case and because we agree with its reasoning.

Even more recently, the Second Appellate District, Division Three explicitly restricted the availability of anti-SLAPP relief to cases where the gravamen of the plaintiff's cause of action was the filing of the unlawful detainer itself (or the service of notices preceding the filing). (*Ulkarim, supra*, 227 Cal.App.4th at p. 1279.) Where, on

the other hand, the gravamen of the cause of action was the allegedly wrongful reason for the decision to terminate the lease (or file the unlawful detainer action), then the cause of action should not be deemed one arising from the protected activity, but rather from the illegality or wrongfulness of the decision to terminate. (*Ibid.*)

"The fact that . . . service and filing [of an unlawful detainer action] preceded the filing of plaintiff's operative complaint, or even triggered the filing of plaintiff's complaint, does not compel the conclusion that her complaint is based on [the landlord's] service of the notice of termination or filing of the unlawful detainer complaint. Courts distinguish a cause of action based on the service of a notice in connection with the termination of a tenancy or filing of an unlawful detainer complaint from a cause of action based on the decision to terminate or other conduct in connection with the termination." (*Ulkarim, supra,* 227 Cal.App.4th at pp. 1275–1276.)

As in *Moriarty, supra,* 224 Cal.App.4th 125, the court in *Ulkarim* ruled in favor of the tenant, this time in a commercial lease, where the shopping center in which plaintiff operated her telephone accessories business terminated her lease and filed an unlawful detainer action. (*Ulkarim, supra,* 227 Cal.App.4th at pp. 1270–1271, 1282–1283.) The tenant promptly filed a lawsuit against the shopping center alleging breach of contract, negligent and intentional interference with prospective economic advantage, unfair competition, and requesting declaratory relief. (*Id.* at pp. 1271–1272.) She also named as a defendant a business competitor whom she alleged induced the shopping center to terminate her lease so the competitor could take over plaintiff's space. (*Id.* at p. 1271.) As in *Moriarty,* the Court of Appeal found the allegations did not "arise from" protected conduct. (*Ulkarim, supra,* at p. 1270.) *Ulkarim* expressly parted ways with *Birkner, supra,* 156 Cal.App.4th 275, and *Feldman, supra,* 160 Cal.App.4th 1467, to the extent those cases might call for a different result. (*Ulkarim, supra,* 227 Cal.App.4th at p. 1279.)

Under the rationale of *Ulkarim* and *Moriarty,* the owners in this case were wrongly granted relief under section 425.16. (See also *Ben-Shahar v. Pickart* (2014) 231 Cal.App.4th 1043 [where a complaint is "predicated upon conduct distinct from the

prosecution of [an] unlawful detainer action—even though the complaint is based upon the unlawful detainer action or arises from it—the tenant's action is not targeted at protected activity and thus does not meet the first prong of the anti-SLAPP analysis"].) The activity which is alleged in the first amended complaint as the basis of liability is that the owners or their agents retaliated against Holbrook for her complaints by "harassing" her and "refusing to make repairs." These allegations have nothing to do with the First Amendment or the right of petition.

The trial court's ruling placed too much emphasis on the designation of the cause of action as one based on "retaliatory eviction," with insufficient attention to the actual substance of the allegations. The title of the cause of action is not controlling. Rather, the courts must look to its "gravamen" or "principal thrust." (*United States Fire Ins. Co. v. Sheppard, Mullin, Richter & Hampton, LLP* (2009) 171 Cal.App.4th 1617, 1625.) " ' "The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's activity that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning." ' " (*Ibid.*)

The owners contend that the amended complaint in "both form and substance" is "directed against protected activity." We cannot accept that view, for it rests on the insupportable premise that any cause of action for a violation of the broad antiretaliation statute necessarily has as its gravamen an actual eviction. (But see *Rich v. Schwab* (1998) 63 Cal.App.4th 803, 817 [eviction not required for recovery of punitive damages under the statute]; see § 1942.5, subd. (f)(2).) Indeed, the owners expressly claim an eviction is necessary to maintain a common law cause of action for retaliatory eviction, and they state that Holbrook's sixth cause of action "makes no reference to a statutory claim for retaliatory eviction." That statement is inaccurate, as the first amended complaint explicitly cites section 1942.5 as a basis for Holbrook's cause of action.

The owners also point to the contents of letters written by Holbrook before she filed her complaint, in which she claimed the owners' service of the three-day and 60-day notices was retaliatory, to substantiate their claim that the service of the notices was the gravamen of her first amended complaint. But such letters, written before any action was

filed by Holbrook, and apparently before she retained legal counsel, cannot govern the determination of the gravamen of the complaint.

We also disagree with the owners to the extent they adhere to the view that any lawsuit alleging a violation of section 1942.5 wherein the landlord has filed an unlawful detainer complaint must necessarily be one arising out of protected petitioning activity. While plaintiffs' cause of action is entitled "retaliatory eviction" and Holbrook claims damages "for each act of retaliatory eviction," those are the only two references to eviction in the entire first amended complaint.[6] The unlawful detainer action is not mentioned at all. The principal thrust of the cause of action is that Holbrook was harassed by management and that repairs were withheld in retaliation for her complaints about habitability.

The owners submitted a declaration by Ciapponi and attached exhibits suggesting the unlawful detainer action grew out of the nonpayment of rent, not the mold dispute. Even if that is true, it is irrelevant to the defendants' initial burden to show the filing of the unlawful detainer action was the "principal thrust" of plaintiffs' sixth cause of action.

Given Holbrook's default in paying rent, her ultimate success on a cause of action under section 1942.5 is problematic, since operation of subdivision (a) of that section is expressly contingent upon the tenant not being in default. (See fn. 5, *ante*.) On the first step of the anti-SLAPP analysis, however, we are concerned only with whether the alleged wrongdoing by the owners "arose from" their protected activity. On that limited point, we believe the legal proceeding to evict Holbrook was not the gravamen—in whole

[6] It appears plaintiffs' counsel used the phrase "retaliatory eviction" as a shorthand way of referring to an action under section 1942.5. This was an unfortunate misnomer, for section 1942.5 may best be described as a broad antiretaliation statute, not one strictly aimed at protecting tenants from "retaliatory eviction." The statute actually forbids acts by landlords that fall far short of eviction and involve no protected activity, including acts to "cause the lessee to quit involuntarily, increase the rent, or decrease any services." (§ 1942.5, subd. (a).) Hence, the cause of action could as easily, and more correctly, have been denominated "retaliation by lessor."

or in part—of the sixth cause of action in the first amended complaint, and therefore the anti-SLAPP statute does not apply.

Because the owners have not carried their burden on the first step of the analysis, we need not proceed to the second step. (*Ulkarim*, *supra*, 227 Cal.App.4th at p. 1282; *Moriarty*, *supra*, 224 Cal.App.4th at p. 140; *Copenbarger*, *supra*, 215 Cal.App.4th at p. 1250.)

The anti-SLAPP statute awards attorney fees to the successful movant. (Subd. (c)(1).) Having resolved the first step of the anti-SLAPP analysis against the owners, they are no longer prevailing defendants entitled to attorney fees. We therefore also reverse that award. (*Copenbarger*, *supra*, 215 Cal.App.4th at p. 1250; *Clark v. Mazgani*, *supra*, 170 Cal.App.4th at p. 1290, fn. 5.)

III. DISPOSITION

The order of March 4, 2013, granting defendants' special motion to strike and dismissing the sixth cause of action, and the order of April 4, 2013, awarding attorney fees, are reversed.

_____
Bolanos, J.*

We concur:

_____
Ruvolo, P.J.

_____
Rivera, J.

* Judge of the San Francisco City and County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.